

assoilzied, because, before the divorcement, they being willing to be separated, they had contracted, the said Stewart for himself, and his said wife for herself and Paton, her mother's brother, for her, and taking burden as cautioner for her, by the which he had bound himself to pay to her 500 merks, in full contentation of all that she could pretend or crave by the marriage; and which sum he had paid to Paton, and reported his acquittance thereof. It was answered, that that contract was made *stante matrimonio*, and was null, and could not exclude her from her action of the law. Nevertheless, the LORDS found the exception relevant; albeit in my opinion it was *illicitum pactum* betwixt the husband and the wife, *et propter turpem causam*, and so was null of the law.

*Fol. Dic. v. I. p. 410. Haddington, v. I. No 1062.*

1611. July 5.

BARCLAY against NAPIER.

IN an action of suspension pursued by Mr William Barclay *contra* Napier, who charged him upon the contract of marriage, the LORDS sustained the charges upon the contract, *licet matrimonium nunquam fuerit in facie ecclesie celebratum*.

*Kerse, MS. fol. 64.*

1630. June 29.

COCHRAN against DAWLING.

PATRICK COCHRAN being obliged in Robert Dawling's contract of marriage with the said Patrick's daughter, to make her equal with the rest of his bairns, the time of his decease, the said Patrick thereafter, by the space of four or five days before his decease, which was seven years after the said contract of marriage, makes his eldest son assignee to all his goods, whereby the said clause of the contract, if the assignation had subsisted, had been elided; whereupon Robert Dawling having raised action to annul the said assignation, as done on death-bed, and to his prejudice, in the said clause and contract of marriage; the said assignee, and he, by intercession of friends, agreed by contract to annul the assignation, in so far as thereby the said Robert his contract was prejudged; and at that same time, the said Robert grants a bond to the said assignee his wife's brother, to infest her in liferent in 400 merks yearly, wherein no mention nor relation was made to the said contract; which bond being desired to be reduced, because it was *donatio inter virum et uxorem*, and was revoked, the LORDS found the bond neither reducible nor revocable; for it was found to be a part of that contract, whereby the foresaid assignation was renounced, (albeit it was a distinct several writ, having neither relation thereto, nor dependence

No 330.

A grant by a husband in favour of his wife, given in consequence of a treaty with her relations, to relinquish a claim by which she would have been deprived of a right she was entitled to, was found no donation by the husband, and not revocable.

No 330.

thereon,) seeing it was of the same date, and betwixt the same parties, and before the same witnesses; and so it was found thereby, that it was *donatio remuneratoria*, which *de jure inter conjuges valet*; albeit the reducer alleged, that it could not be called *remuneratoria donatio*, seeing the renouncing of the assignation done on death-bed, which was thereby null in the law, was no benefit, for which the bond quarrelled might be maintained to have been given in remuneration, by reason he got no more thereby, than before was conditioned to him by the contract of marriage, and which could not be prejudged by that assignation done on death-bed, neither did the bond make any reference to the said contract of agreement, and had nothing to do therewith, but was a several writ not done *eo intuitu*: which reply was repelled, and the bond sustained.

Act. Aiton &amp; Stuart.

Alt. Nicolson.

Clerk, Gibson.

Fol. Dic. v. 1. p. 410. Durie, p. 522.

1634. March 14.

GIB against MILLER.

No 331.

A contract, though made betwixt husband and wife *stante matrimonio*, whereby he reponed her to all he got by her, and she renounced all she could claim by his death, was sustained.

ANDREW GIB having married Christian Hume, the relict of a prior husband, after they were married, they not living in concord together, and *stante matrimonio* they make a contract betwixt them, with consent of the bairns of the prior marriage, and friends, whereby it was convened, that her husband should repon her to all the goods and monies which he had received by her marriage, and pertaining to her, and that she should therefore renounce all part and portion of all gear pertaining to him, which she might claim by his decease; there-after the wife dying, and her testament being confirmed, whereby her bairns got all the gear pertaining to her, another (by these bairns' motion) takes a dative *ad omnia* to the half of the goods, pertaining to the husband, not confirmed in the wife's testament, and pursues the said husband therefor; who, defending himself with the said contract, and the pursuer *answering*, that it was a writ against law, done betwixt husband and wife, who cannot contract *stante matrimonio*, and therefore is null; for otherwise all women might be prejudged heavily, who might be induced to prejudge themselves the time of their marriage, if such writs were permitted; the LORDS not the less sustained the exception; and found the contract lawful, albeit done betwixt man and wife the time of their marriage, because it was *contractus mutuus*, containing therein a donation reciprocal and *vicissitudinarie*, which is not prohibited in law; and none could quarrel the contract, except they would restore that which was received by the woman, and render it back again to the husband; for it were iniquity that the wife should prejudge the husband, by receiving from him, and not to render again what was received, if any would have her free of the contract; for *jura subveniunt læsis et deceptis, et non lædentibus et decipientibus*; likeas the woman after the contract compeared judicially, and ratified the same,